STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY SOLANO, JR.,

Plaintiff-Appellant/Cross-Appellee,

v

JO-BET INCORPORATED,

Defendant-Appellee/Cross-Appellant,

and

BOBBY DEAN MARTIN,

Defendant.

UNPUBLISHED
April 4, 2000

No. 207551
Wayne Circuit Court
LC No. 96-526299-NO

Before: Gribbs, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

Plaintiff appeals, and defendant Jo-Bet Incorporated has filed a cross-appeal, from the jury verdict and subsequent court order granting in part defendants' motion for judgment notwithstanding the verdict (JNOV). This action for damages arose when defendant Bobby Dean Martin, an employee of defendant Jo-Bet, allegedly struck plaintiff with a beer bottle after ejecting him from defendant's topless bar, Henry VIII. We reverse and remand.

In reviewing a decision on a motion for JNOV, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

As part of defendants post-trial motion for JNOV or new trial, defendants requested a new trial for defendant Jo-Bet in reliance on *Bryant v Brannen*,180 Mich App 87; 446 NW2d 847 (1989). Defendants argued that, on the battery count, Jo-Bet was not responsible for a serious felony committed by an employee outside the scope of his employment. The trial court agreed and concluded that the

jury had been improperly instructed on this issue and that the evidence did not support the jury verdict against defendant Jo-Bet on a respondeat superior theory. The trial court ordered a directed verdict on this issue as to defendant Jo-Bet.

Defendants also argued that the evidence was not sufficient to support a jury verdict of battery by defendant Martin. The trial court disagreed and found that the issue of Martin's assault hinged on the credibility of witnesses and that it was appropriate for the jury to decide, and that the damage award was not excessive. The trial court affirmed the verdict of exemplary and compensatory damages as to defendant Martin.

Defendants argued that there was no evidence to support the jury verdict that Jo-Bet was negligent for creating conditions that led to improper conduct by defendant Martin as the manager. The trial court disagreed and denied defendant's motion on this ground.

Finally, the trial court found that the verdicts against defendant Martin on battery and negligence constituted a double recovery for the same injury, set aside the verdict against defendant Martin for negligence and found defendant Martin liable for $130,000 exemplary and compensatory damages. Defendant Jo-Bet remained liable for the $65,000 jury verdict on negligence.

On appeal, plaintiff argues that defendants lacked standing to challenge the verdict on the basis of improper jury instructions. There is no merit to this issue. The concept of standing represents a party's interest in the outcome of litigation which ensures sincere and vigorous advocacy. *House Speaker v Governor*, 443 Mich 560, 572; 506 NW2d 190 (1993). MCR 2.201(B). Defendants clearly have an interest in the outcome of this litigation.

Plaintiff also argues that the trial court misapplied the law, that the evidence supports the jury verdict, and that the trial court erred in reducing the judgment against defendant Jo-Bet.

Prior to trial, plaintiff provided the trial court with *Stewart v Napuche*, 334 Mich 76; 53 NW2d 676 (1952). On the basis of its reading of *Stewart*[1] which provides the general rule that "the master is liable for the acts of a servant while the servant is acting within the scope of his employment," the trial court instructed the jury that "if you find that the defendant, Bobby Martin, struck the plaintiff, Anthony Solano, with a beer bottle, you're directed to find in favor of the plaintiff against both defendants." The trial court also instructed that "if you find that [defendant Jo-Bet] placed Bobby Martin in a position of trust or responsibility and committed him to the management of its business and the care of its property, you're instructed that [defendant Jo-Bet] is legally responsible for the acts of Bobby Martin…even if you find that he acted beyond the strict line of his duty or authority, if he inflicted an unjustifiable injury upon the plaintiff." After hearing defendants' motion for JNOV, the trial court concluded that its instruction was in error and entered a verdict on this issue in favor of defendant Jo-Bet. We agree with the trial court that the instruction was in error. However, we do not agree that it was appropriate to direct a verdict in favor of defendant Jo-Bet.

An employer is not liable for an employee's acts which are clearly inappropriate or unforeseeable in the accomplishment of an authorized result. *Bryant, supra* at 101, quoting 1

Restatement Agency 2d, section 231, p512. An employer may, however, be vicariously liable for the intentional tort of an employee if the tort is committed in the course and within the scope, or the apparent scope, of the employment. *Green v Shell Oil*, 181 Mich App 439, 446-447; 450 NW2d 50 (1989); *Leitch v Switchenko,* 169 Mich App 761, 765; 426 NW2d 804 (1988). The apparent scope of the employee's authority is based upon conduct of the employer which "lead[s] the third party to reasonably believe that the employee's actions were taken on behalf of the employer. The critical factors are the employer's conduct and the third party's reasonable belief." *Id.* at 766. The determination whether an employee is acting within the scope of employment is for the trier of fact unless it is clear that the employee was acting to accomplish some purpose of his own. *Id.* 766. If it is apparent that the employee is acting to accomplish a purpose of his own, then a directed verdict for the employer would be appropriate. *Green, supra* 447.

Under normal employment circumstances, we would conclude that an employee's assault on a customer with a beer bottle was so "clearly inappropriate to…the authorized result," *Bryant, supra* at 101, that the employer could not be liable as a matter of law. In this case, however, the nature of defendant Martin's employment creates a far closer question whether Martin was acting within the scope of his apparent employment and whether he was acting for a personal purpose. The question here is whether defendant Martin "could in some way have been held to have been promoting his master's business." *Bryant,* supra at 99. The evidence here included defendant Martin's testimony that he was "just doing my job," along with evidence that he had wide discretion to act as a "peacemaker," and that the bouncers primary function was to protect employees rather than patrons. We believe that plaintiff could have reasonably believed that defendant Martin's actions were taken on behalf of his employer. *Leitch, supra.* Accordingly, the trial court's grant in part of defendants' motion for JNOV was improper.

Plaintiff also argues that the trial court improperly reduced defendant Martin's damages. Plaintiff does not challenge the trial court's finding that the jury should have been instructed that plaintiff was presenting two alternate theories and cites no authority for why he should be compensated twice for the same injury by the same defendant. We find no error.

Plaintiff contends that the trial court improperly failed to sanction defendants for discovery violations. A trial court's decision relating to sanctions will not be reversed unless it abused its discretion. *Merit Mfg v ITT Higbie,* 204 Mich App 16, 21; 514 NW2d 192 (1994); *Dean v Tucker,* 182 Mich App 27, 32; 451 NW2d 571 (1990). We have reviewed plaintiff's numerous grievances and find no abuse of discretion.

In light of our decision that a new trial is required because of the erroneous jury instruction, we need not address plaintiff's claim that the trial court abused its discretion by awarding mediation sanctions in an amount less than plaintiff requested. In any case, it is clear that the trial court thoroughly reviewed plaintiff's request and we would find no abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).

Nor do we find it necessary to address defendant's issues on cross-appeal. Many of defendant's issues are unpreserved and unsupported by authority, and all are rendered moot by our disposition of this matter.

Reversed and remanded. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Hilda R. Gage

[1] Defendants argue that plaintiff acted improperly in not bringing *Bryant, supra,* to the trial court's attention and point out that plaintiff's counsel never actually said that he was unaware of the *Bryant* decision. Defendants do not address why they did not research the appropriate standard themselves on this issue that directly affected their liability. Further, as plaintiff argues, *Stewart* is still good law and is not actually contradicted by *Bryant*. In *Stewart,* this Court concluded that the employee had been acting within the scope of his employment; in *Bryant,* this Court concluded that the employee was not.